UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

SENDO LIMITED, SENDO INTERNATIONAL LIMITED, SENDO HOLDINGS PLC, and SENDO AMERICA, INC.,	§	Civil Action No. 5:02CV282 (DF)
Plaintiffs,	§	Jury Trial Demanded
v.	§	Judge: Folsom
MICROSOFT CORPORATION, MICROSOFT LICENSING, INCORPORATED and MICROSOFT CAPITAL CORPORATION,	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a) (ORAL HEARING REQUESTED)

Plaintiffs Sendo Limited, Sendo International Limited, Sendo Holdings PLC, and Sendo America, Inc. (collectively referred to as "Sendo" or the "Plaintiffs") hereby file this Response to Defendants' Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) ("Defendants' Motion") and would show the Court as follows:

I.

INTRODUCTION

Sendo filed this lawsuit to recover damages, and potentially injunctive relief, suffered when the Defendants executed a plan to improperly raid Sendo of its technology and drive it to the brink of bankruptcy. This plan was carried out in a variety of venues, including Texas, Sendo's choice of forum and the home of Sendo America, Inc.

31

Exhibits ARE UNDER Seal

Defendants concede that venue is proper in the Eastern District of Texas, which of course it is[1]. *See Tel-Phonic Servs., Inc. v. TBS Int'l*, 975 F.2d 1134, 1141 n.7 (5th Cir. 1992) (acknowledging that 28 U.S.C. § 1404(a) was applicable when venue is proper despite forum-selection clause designating another jurisdiction). Nevertheless, Defendants ask this Court to exercise its discretion and transfer this case to the Western District of Washington pursuant to 28 U.S.C. § 1404(a). *See In re Triton Ltd. Sec. Litig.*, 70 F. Supp. 2d 678, 688 (E.D. Tex. 1999) (decision to transfer venue for the convenience of the parties and witnesses is within "the sound discretion of the district court"). Defendants bear a heavy burden of presenting evidence that "*substantially* weighs in favor of transfer," and establishing that Sendo's choice of forum should be disturbed, which the Eastern District of Texas says "rarely" should be done. *Mohamed v. Mazda Motor Corp.*, 90 F. Supp. 2d 757, 768, 774 (E.D. Tex. 2000) (citing *Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co.*, 844 F. Supp. 1163, 1165 (S.D. Tex. 1994).

Defendants' Motion relies almost exclusively on a forum-selection clause contained in only one of over twenty separate agreements between the parties, and fails to harmonize even that clause with other contradictory provisions in that agreement. The parties did not intend venue to be exclusively in Washington as Defendants contend, but rather, only agreed that Washington was one of the places where suit could be brought. Remarkably, Defendants move to transfer under a statute which is "[f]or the convenience of the parties and witnesses," but fail to identify any witnesses where convenience would be better served if this case were transferred to Washington, reason alone to deny Defendants' Motion. *Brock v. Baskin-Robbins USA Co.*,

---

[1] 28U.S.C. § 1391(a) provides that venue is proper in "a judicial district where any defendant resides, if all defendants reside in the same state...(and under 1391(c)) for purposes of venue under this chapter, a defendant that is a corporation (as defendants are here) shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." Defendants have not contested personal jurisdiction in this case nor have they moved to dismiss for lack of proper venue. These defenses are therefore waived and venue is proper in this district as a matter of law. *See* Rule 12(h)(1) F.R.C.P.

113 F. Supp. 2d 1078, 1088 (E.D. Tex. 2000) (where defendant failed to specifically identify key witnesses and outline the substance of their testimony, defendant fell "far short" of supporting transfer); *In re Triton*, 70 F. Supp. 2d at 689-90 (same); *Thurmond v. Compaq Computer Corp.*, No. 1:99-CV-0711(TH), 2000 WL 33795090, at *9 (E.D. Tex. March 1, 2000) (same).

Defendants' conduct in this case spans the globe, from France, to England, to Taiwan, and most importantly, to Texas, where a substantial number of events underlying this lawsuit occurred. While Defendants attempt to downplay the extensive contacts that they and Sendo had with Texas in connection with this dispute, the fact remains that much of Sendo's relationship with Defendants centered around the State of Texas, and specifically, Texas Instruments, Inc. ("TI"), who worked with both Sendo and Microsoft on Microsoft's Stinger software and Sendo's Z100 mobile phone ("Z100"). By way of specific example, please see Declaration of Sean F. Rommel (Rommel Decl.), *Exhibit 1*, which identifies the key contacts between the parties and the State of Texas, and also the declarations of Regis Adjamah Maureen Baverstock, Olivier Boireau, Hugh Brogan, Greg Christian, Andrew Hirsch, Howard Lewis, and Jacqueline Valenzuela, which describe these contacts in greater detail.

II.

ARGUMENT

A. Venue Is Proper In The Eastern District Of Texas

A civil action founded only on diversity jurisdiction, like this case, may be brought in "a judicial district where any defendant resides, if all defendants reside in the same State." 28 U.S.C. § 1391(a). All of the Defendants reside in the Eastern District of Texas, and thus, venue is proper. *See* 28 U.S.C. § 1391(c) ("a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced."). Defendants concede as much by filing a motion to transfer venue pursuant to 28

U.S.C. § 1404(a). *See Tel-Phonic Servs., Inc.*, 975 F.2d at 1141 n.7 (acknowledging that 28 U.S.C. § 1404(a) was applicable when venue is proper despite forum-selection clause designating another jurisdiction); *LaFargue v. Union Pac. R.R.*, 154 F. Supp. 2d 1001, 1004 (S.D. Tex. 2001) (same).

B. The Standards Of 28 U.S.C. § 1404(a) Govern Defendants' Motion

In determining whether an action should be transferred under § 1404(a), the court examines factors which fall into two groups: those relating to the convenience of the litigants and those relating to the public interest in the fair and efficient administration of justice. *Mohamed*, 90 F. Supp. 2d at 771; *In re Triton*, 70 F. Supp. 2d at 688. The private convenience factors include: (1) plaintiff's choice of forum; (2) the convenience of the parties and material witnesses; (3) the place of the alleged wrong; (4) the location of counsel; (5) the cost of obtaining the attendance of witnesses and the availability of compulsory process; (6) the accessibility and location of sources of proof; and (7) the possibility of delay and prejudice if transfer is granted. *Id.*; *see also Brock*, 113 F. Supp. 2d at 1086. The public interest factors include: (1) the administrative difficulties caused by court congestion; (2) the local interest in adjudicating local disputes; (3) the unfairness of burdening citizens in an unrelated forum with jury duty; and (4) the avoidance of unnecessary problems in conflict of laws. *Id.* As discussed in sections E and F, below, all of these factors weigh against transfer to the Western District of Washington.

While Defendants move for transfer pursuant to 28 U.S.C. § 1404(a), their Motion seems to confuse the appropriate standard for a § 1404(a) analysis. In fact, Defendants attempt to blend a motion to dismiss for improper venue based upon a forum-selection clause (a motion which Defendants have not even filed) with a motion to transfer pursuant to 28 U.S.C. § 1404(a). Defendants assume, incorrectly, that an exclusive forum selection clause in one of its agreements

with Sendo controls this Court's analysis. Defendants are wrong for three separate and independent reasons. First, the forum selection clause contained in the Strategic Development and Marketing Agreement ("SDMA") is, at best, ambiguous. Second, the very nature of the parties' numerous agreements, many of which conflict with the SDMA's forum-selection clause, contemplates multiple forums to the exclusion of none. Finally, even if the SDMA's forum selection clause is exclusive, it is but one factor in this Court's § 1404(a) analysis.

This Court has addressed the proper standard to be used when analyzing a forum-selection clause--"[w]hen a federal court sitting in diversity must decide whether to enforce a forum-selection clause under which the parties have agreed to resolve their dispute in another federal court, 28 U.S.C. § 1404(a) governs the court's decision." *Brock*, 113 F. Supp. 2d at 1082. Further, if venue is proper under 28 U.S.C. § 1391, like it is in this case, the standards of § 1404(a) apply "rather than the standard in *Bremen*." *Brock*, 113 F. Supp. 2d at 1084 (referring to *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and citing *Stewart Org., Inc. v Ricoh Corp.*, 487 U.S. 22, 28-29 (1972)). Thus, Defendants' heavy reliance on *Bremen* for the proposition that 'a forum–selection clause should control absent a strong showing that it should be set aside' is completely inapplicable to this Court's analysis of Defendants' § 1404(a) Motion. *See Brock*, 113 F. Supp. 2d at 1083 (Court denied defendants' motion to dismiss and transfer despite existence of valid forum selection clauses because defendants failed to carry their burden under § 1404(a)); *Box v. Ameritrust Texas, N.A.*, 810 F. Supp. 776, 781-82 (E.D. Tex. 1992) (Court refused to give forum-selection clause controlling weight, and instead, treated it as only one of several factors in its § 1404(a) analysis); *Kerobo v. Southwestern Clean Fuels, Corp.*, 285 F.3d 531, 537-38 (6th Cir. 2002) ("Supreme Court concluded that 28 U.S.C. § 1404(a) governed the parties' venue dispute and the district court's decision as to whether the forum-selection

clause was valid."); *Red Bull Assocs. v. Best W. Int'l, Inc.*, 862 F.2d 963, 967 (2nd Cir. 1988) (forum-selection clause only one factor in analysis). Despite Defendants' wishful thinking to the contrary, therefore, a forum selection clause is but one factor in this Court's § 1404(a) analysis.[2]

C. Defendants Bear The Burden Of Demonstrating That Transfer Is Warranted

Regardless of whether the plaintiff or the defendant moves for transfer under § 1404(a), "the moving litigant seeking transfer bears the burden of demonstrating that a transfer of venue is warranted." *Mohamed*, 90 F. Supp. 2d at 768 (citing *Time, Inc. v. Manning*, 366 F.2d 690 (5th Cir. 1966)); *Brock*, 113 F. Supp. 2d at 1085-86 ("party seeking the transfer bears a heavy burden of showing that the convenience factors favor transfer"); *LeDoux v. Isle of Capri Casinos, Inc.*, 218 F. Supp. 2d 835, 837 (E.D. Tex. 2002) (same). To prevail, the moving litigant "must demonstrate that the balance of convenience and justice *substantially* weighs in favor of transfer." *Mohamed*, 90 F. Supp. 2d at 768 (citing *Gundle*, 844 F. Supp. at 1165). Moreover, the defendant seeking transfer cannot carry this burden by making "unsupported assertions," as Defendants do in this case, but must "properly establish the relevant facts by affidavit, deposition, or otherwise." *Brock*, 113 F. Supp. 2d at 1086 (citing *In re Triton*, 70 F. Supp. 2d at 688).

D. The Parties Did Not Agree That Washington Is The Exclusive Forum For Their Disputes, And At This Stage Of The Case, This Dispute Must Be Resolved In Favor of Non-Movant Sendo

In their effort to convince the Court that Washington should be deemed the exclusive forum for the parties' dispute, Defendants direct this Court to one document which they claim

---

[2] Moreover, while the presence of a forum-selection clause can figure in the court's decision, the "court may also consider relative bargaining power of parties" in its individualized case-by-case consideration of convenience and fairness under § 1404(a). *Brock*, 113 F. Supp. 2d at 1086; *see also Box*, 810 F. Supp. at 782 (the Eastern District of Texas cautioned that courts should consider the fairness of transfer 'in light of the forum selection clause *and the parties' relative bargaining power.*') (citing *Stewart*, 487 U.S. at 29). As Sendo's Complaint makes clear, there is little doubt that Microsoft, a modern day Goliath, had considerably more bargaining power than Sendo in the parties' dealings with one another. (Complaint ¶¶ 20-23, 27-31, 33-36, 38, 41-42).

controls the Court's analysis--the SDMA. However, the parties' numerous agreements, many between some plaintiffs and not others, some defendants and not others, and some including non-parties to this suit, evidence that no real jurisdiction or forum has been exclusively agreed upon by the parties. (Rommel Decl., *Exh. 8*) (list of agreements conflicting with the SDMA).

(1) The SDMA Is Not The "Master" Agreement

On October 20, 1999, Sendo Limited and Microsoft executed their first agreement, the NDA. The parties operated under this agreement for more than a year and for approximately one-third of their working relationship. Among other things, Sendo has sued Defendants for breach of the NDA, fraudulently inducing Sendo to enter the NDA, and engaging in a three year course of conduct aimed at misappropriating trade secrets and confidential information protected by the NDA. (Complaint ¶¶ 50-57, 79-80, 88-90). If anything, the NDA is the "central" agreement between the parties, and thus, to the extent the Court considers a forum selection clause in its § 1404(a) analysis, it should consider the permissive one contained in the NDA.

The NDA contains the following non-exclusive choice of law and forum-selection provision: "This Agreement shall be construed and controlled by the laws of the State of Washington, and both parties further consent to jurisdiction by the state and federal courts sitting in the State of Washington." (Rommel Decl., *Exh. 8, a* at ¶ 4(g)) (emphasis added). A permissive forum-selection clause, like the one contained in the NDA, "authorizes jurisdiction or venue in a selected forum, but does not prohibit litigation elsewhere." *Bentley v. Mutual Benefits Corp.*, 2002 U.S. Dist. LEXIS 24945, at *6 (S.D. Miss. Sept. 13, 2002) (citing *Caldas & Sons, Inc. v. Willingham*, 17 F.3d 123, 127-28 (5th Cir. 1994)). An exclusive forum-selection clause, on the other hand, "expressly limit[s] the forum(s) to the one(s) listed in the contract." *Bentley*, 2002 U.S. Dist. LEXIS 24945, at *6; *see also Caldas*, 17 F.3d at 128 (a forum-selection clause is

exclusive if the "contract, on its face, clearly limits actions thereunder to the courts of a specified locale."); *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 956-57 (5th Cir. 1974) (same); *Samak v. Buda*, No. 1:02-CV-288, 2002 WL 31246518, at *3 n.4 (E.D. Tex. Oct. 8, 2002) ("Many courts require that a forum selection clause explicitly state the word exclusive before they will determine that a clause is a mandatory forum selection clause.") (emphasis added).

In *Keaty*, defendants moved to dismiss plaintiff's breach of contract claim for lack of jurisdiction based on a forum selection clause which stated that "This agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York." *Keaty*, 503 F.2d at 956. The Fifth Circuit reversed the district court's dismissal, despite the provision's use of the word "shall," holding that it fell short of being a mandatory forum-selection provision because "this is not a situation where the contract, on its face, clearly limits actions thereunder to the courts of a specified locale." *Id.* at 956-57. Similarly, in *Caldas*, defendants moved to dismiss based on a forum selection clause which provided that "[t]he laws and courts of Zurich are applicable." *Caldas*, 17 F.3d at 123. The Fifth Circuit affirmed the district court's refusal to dismiss the case because "the forum selection clause at issue at most permitted claims arising out of the contract to be tried in the Zurich courts," and "the language does not clearly indicate that the parties intended to declare Zurich to be the exclusive forum for the adjudication of disputes arising out of the contract." *Id.* at 127-28. As such, the Fifth Circuit found that the provision was properly construed against Defendants as "permissive" and declined to enforce the provision. *Id.* at 128.

Like the forum-selection clauses at issue in *Keaty* and *Caldas*, the NDA's forum-selection clause does not contain the word "exclusive." Instead, it merely authorizes venue in the Western District of Washington and does not prohibit litigation elsewhere. At most, the

NDA's forum-selection clause provides that neither party can object to venue for actions commenced in the State of Washington. Nothing in the clause, however, indicates that Washington courts have exclusive jurisdiction or that Sendo is prohibited from filing suit in the Eastern District of Texas. Accordingly, the NDA's forum-selection clause is "permissive" and should be afforded little to no weight in the Court's transfer analysis. *See Keaty*, 503 F.2d at 956-57; *Caldas*, 17 F.3d at 127-28; *Samak*, 2002 WL 31246518, at *2-4.

(2) The NDA's Permissive Forum-Selection Clause Preempts The SDMA's Purported Exclusive Forum-Selection Clause

Approximately one year after the parties executed the NDA, Sendo Limited, Sendo International Limited, and Microsoft entered into the SDMA. Defendants mistakenly dub the SDMA the "master agreement" between the parties in an effort to rely on the SDMA's purported exclusive forum-selection clause. (Rommel Decl., *Exh.* 8, *c* at ¶ 14.1). However, Defendants neglect to advise the Court that the terms of the SDMA are specifically subject to the terms of the NDA.

According to paragraph 16.2 of the SDMA, "[u]pon execution by both Parties, this Agreement and the non-disclosure agreement described in Section 7 shall constitute the entire agreement between the Parties with respect to the subject matter hereof and merge all prior and contemporaneous communications." *Id.* at ¶ 16.2 (emphasis added). Section 7 of the SDMA states that:

> The terms and conditions of this Agreement and information provided pursuant to this Agreement ***shall be subject to*** *the terms and conditions of the Non-Disclosure Agreement dated October 20, 1999,* between Microsoft and Sendo ("NDA") and *shall be binding upon all Parties to this Agreement as if each Party signed the NDA.* The NDA ***shall be incorporated herein by reference.***

Id. at ¶ 7.1 (emphasis added). When a "document is incorporated into another by reference, both instruments must be read and construed together." *In Re: C & H News Co.*, 2003 Tex. App.

LEXIS 393, *6 (Tex. App.--Corpus Christi, Jan. 16, 2003). Because the NDA and the SDMA must be read and construed together, and because the terms of the SDMA, including its forum-selection clause, are "subject to the terms and conditions of the Non-Disclosure Agreement," the NDA's permissive forum-selection clause necessarily trumps the SDMA's forum-selection clause. As discussed above, this Court should afford little to no weight to a permissive forum-selection clause. *See Keaty*, 503 F.2d at 956-57; *Caldas*, 17 F.3d at 127-28; *Samak*, 2002 WL 31246518, at *2-4.

If there is any ambiguity in the language of a forum-selection clause, like there is, at the very least, in this case, "the language is properly construed against" the Defendants as a permissive forum-selection clause. *Caldas*, 17 F.3d at 128; *see also Brock*, 113 F. Supp. 2d at 1089 ("[a]t best, the Defendants could argue that the clause is ambiguous, in which case it would be construed *strongly* against the Defendants."). Furthermore, because Defendants drafted the SDMA's forum selection clause, any doubt as to its construction should be construed against Defendants. *Keaty*, 503 F.2d at 957 (quoting, *Tenneco, Inc. v. Greater LaFourche Port Comm'n*, 427 F.2d 1061, 1065 (5th Cir. 1970)) (when confronted with "two opposing, yet reasonable, interpretations of the same contract provision, this Court adopted the traditional rule whereby, 'an interpretation is preferred which operates more strongly against the party from whom [the words] proceed.'").

(3) The Parties' Multiple Agreements, Many of Which Contain Conflicting Forum Selection Provisions, Creates "Permissive" Venue In Washington

Even if the Court were to find that the SDMA's forum-selection clause somehow survives its merger with the NDA's permissive forum-selection clause, the SDMA's forum-selection clause should nevertheless be accorded little to no weight because the subsequent acts and agreements of the parties undermine the purported "exclusivity" of that clause. Defendants

intentionally entered into at least twenty separate agreements with Sendo, one before the SDMA, and the remaining after, that contain choice of law and forum selection provisions directly conflicting with the SDMA's. (*See* Rommel Decl., *Exh. 8*) (list of agreements conflicting with the SDMA). This intentional conduct is inconsistent with any claimed right for a purported "exclusive" forum, and thus, Defendants have waived the purported "exclusive" nature of the SDMA's forum-selection clause. *Robinson v. Robinson*, 961 S.W.2d 292 (Tex. App--Houston [1st Dist] 1997) (quoting, *Sun Exploration v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987)) (waiver is as an "intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.").

Sendo claims that Defendants breached four agreements other than the SDMA (Complaint ¶ 79), a fact completely ignored by Defendants in their Motion, all of which contain choice of law or forum selection provisions which directly conflict or contradict the SDMA's:

a. Shareholders' Agreement

On May 24, 2001, Sendo Holdings PLC and Microsoft, along with other entities and persons, entered into a Shareholders' Agreement. (Rommel Decl., *Exh. 8, e*). Paragraphs 4.1.3, 4.1.4, and 15.1-15.3, among others, specifically reference the duties of confidentiality and trust regarding information learned pursuant to the agreement. In addition, paragraph 23 of the Shareholders' Agreement provides that:

> This Agreement is governed by English law. The courts of England have exclusive jurisdiction to settle any dispute arising from or connected with this Agreement (a "Dispute"). The parties agree that the courts of England are the most appropriate and convenient courts to settle any Dispute and, accordingly, that they will not argue to the contrary.

(Rommel Decl., *Exh. 8, e* at ¶¶ 23.1, 23.2, and 23.3). Plaintiffs' allegations involve a dispute arising from or connected with the Shareholders' Agreement (Complaint ¶¶ 79, 89) and

Defendants can hardly assert that Washington is the exclusive forum for this case when Microsoft has executed numerous agreements, including the Shareholders' Agreement, which clearly indicate otherwise.

b. Software Source Code License

On July 12, 2001, Sendo Limited and Sendo International Limited entered into a Software Source Code License ("Software Code License") with Microsoft. (Rommel Decl., *Exh. 8, i*). The Software Code License's preamble specifically references the SDMA and section 10 states, "This Agreement supersedes all prior arrangements undertakings and Agreements (whether oral or written) between the parties hereto in respect of the subject matter hereof." (Rommel Decl., *Exh.8, i*, at p. 1, § 10). Additionally, section 13 of the Software Code License states, "This Agreement shall in all respects be governed and construed in accordance with the laws of England." (*Id.* at § 13).[3] Sendo claims that Defendants breached the Software Code License (Complaint ¶ 79), and pursuant to the explicit terms of the Software Code License, the SDMA's choice of law and forum selection provision cannot not apply to this breach of contract claim. Once again, therefore, Defendants can hardly assert that Washington is the exclusive forum for this case.

c. Term Credit Agreement, Guarantee Agreements, And Debenture Agreements

On February 11, 2002, Sendo Holdings PLC and Microsoft Capital Corporation entered into a Term Credit Agreement containing the following permissive forum selection clause:

> Borrower [Sendo Holdings PLC] hereby *submits* to the *nonexclusive* jurisdiction of the United States District Court for the Western District of Washington and of any Washington State court

[3] The parties also executed two addendums to the Software Code License on July 13, 2001, and January 30, 2002. Both of these addendums incorporate the English choice of law provision contained in the Software Code License. (Rommel Decl., *Exhs.8, j* at ¶ 2 and 8, *k* at ¶ 2).

> sitting in the King County for purposes of all legal proceedings arising out of or relating to this Agreement, the other Loan Documents or the transactions contemplated hereby or thereby.

(Rommel Decl., *Exh. 8, m* at § 9.13) (emphasis added). As part of the Term Credit Agreement, Sendo International Limited and Sendo Limited entered into separate Guarantee agreements with Microsoft Capital Corporation ("MCC") which contained Nevada choice of law provisions and permissive forum selection clauses similar to the Term Credit Agreement's. (Rommel Decl., *Exhs. 8, n and o* at ¶¶ 21, 22.1-.2). Finally, on February 12, 2002, Sendo Limited, Sendo International Limited, and Sendo Holdings PLC entered into separate Debenture agreements with MCC which were explicitly governed by either the laws of England or the Cayman Islands. (Rommel Decl., *Exhs. 8, p, q, and r* at ¶ 22). All of Sendo's claims against Defendant MCC, therefore, are governed by forum selection and choice of law provisions which are neither exclusive to Washington nor governed by Washington's laws.

In sum, many of Sendo's agreements with Defendants contain forum selection clauses which conflict with the one contained in the SDMA.[4] These agreements undermine, if not completely eliminate, the purported exclusivity of the SDMA's forum selection clause, and thus, Defendants have waived the purported "exclusive" nature of that provision. At the very least, it creates an ambiguity as to whether the clause survives, is permissive, or is exclusive. As noted earlier, if there is any ambiguity in the language of the forum-selection clause, "the language is properly construed against" the Defendants. *Caldas*, 17 F.3d at 128; *see also Brock*, 113 F. Supp. 2d at 1089 ("[a]t best, the Defendants could argue that the clause is ambiguous, in which case it would be construed *strongly* against the Defendants."). Accordingly, this Court should give little, if any, weight to the SDMA's forum selection provision.

---

[4] A discussion of the NDA's forum selection provision, which not only conflicts with the SDMA's, but supercedes it, is discussed in sections D.1 and D.2, *supra*.

(4) The SDMA's Forum-Selection Clause Was Obtained By Fraud And Overreaching

According to the Eastern District of Texas, "the reasons to enforce a forum selection [sic] clause are compelling only if the clause is the result of a 'freely negotiated private . . . agreement, unaffected by fraud, undue influence, or overweening bargaining power.'" *Box*, 810 F. Supp. at 782 (citing *Bremen*, 407 U.S. at 12). The SDMA's forum-selection clause, relied on almost exclusively by Defendants as the basis for their Motion, was procured by fraud and overweening bargaining power, and thus, this Court should not consider that clause in its § 1404(a) analysis.

As part of Defendants' plan to plunder Sendo's proprietary information, expertise, market knowledge, and customers, Defendants induced Sendo to enter into the NDA on October 20, 1999. (Complaint ¶ 89). As discussed above, the NDA contained a permissive forum-selection clause. Thereafter, Sendo began to allocate significant resources and time to developing its Z100 mobile phone, the parties negotiated a Term Sheet which was signed by Sendo, and the parties began to negotiate the terms of the SDMA. (Brogan Decl. ¶ 5; Lewis Decl. ¶ 3). Little did Sendo realize, however, Defendants would not finalize the SDMA for another twelve months, only after Sendo had devoted considerable resources to the Z100 project. In fact, Microsoft, knowing of the opportunity cost to Sendo of not proceeding with the Z100 project, not to mention the "sunk costs" Sendo had already invested in the project, demanded that Sendo agree to a purportedly "exclusive" forum-selection clause as opposed to the permissive one the parties had operated under for nearly a year. This "bait and switch" is a blatant example of Microsoft's overreaching and fraud, and thus, the SDMA's forum-selection clause should be invalidated.

Defendants' fraud as to the SDMA's forum-selection clause is further revealed in the agreement itself:

> 3.3.4 Sendo grants to Microsoft, under all Sendo International Property Rights, a worldwide, non-exclusive, irrevocable, royalty-

> free license to (i) make, use, copy, modify and create derivative works of the Sendo Smartphone IP to create, distribute, license, offer to sell, sell, rent, lease, or lend Smartphones, and (ii) to sublicense the foregoing rights to third parties for such purposes, provided, however, that **Microsoft may not exercise any of the license rights under this Section unless and until Sendo is in breach of Section 12.1.2 of this Agreement** . . . .

(Rommel Decl., *Exh.* 8, *c* at ¶ 3.3.4) (emphasis added). Importantly, ¶¶ 12.1 and 12.1.2 of the SDMA state, "This Agreement may be terminated by either Party if the other Party commits an event of default by . . . entering bankruptcy, reorganization, composition or other similar proceedings . . . **whether voluntary or involuntary** . . . ." (Emphasis added). The exclusive nature of the SDMA's forum-selection clause was part of Microsoft's plan to drive Sendo into bankruptcy, assert an event of default pursuant to ¶ 12.1.2, acquire all of Sendo's proprietary information through a royalty-free license, and then force a bankrupt Sendo to litigate its grievances half-way across the world. Accordingly, Microsoft's insistence on a purportedly exclusive forum-selection clause in the SDMA represents yet another nail in the coffin in its plan to destroy Sendo's business and gain Sendo's wealth of experience, knowledge, and intellectual property. Because the SDMA's forum selection clause was obtained by fraud and overweening bargaining power, therefore, it is invalid, and is of no weight in this Court's § 1404(a) analysis.

(5) The SDMA's Forum-Selection Clause Does Not Apply To Sendo's Tort Claims

Even if the Court were to consider the SDMA's forum-selection clause in its § 1404(a) analysis, that clause does not apply to Sendo's tort claims, and thus, merits little weight. "Before a district court can even consider a forum selection clause in its transfer analysis, it first must decide whether the clause applies to the type of claims asserted in the lawsuit." *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 692 (8th Cir.), *cert. denied*, 522 U.S. 1029 (1997). 'Whether tort claims are to be governed by forum selection provisions depends upon the intention of the parties reflected in the wording of particular clauses and the facts of each case.'

Id. at 693 (citing *Berrett v. Life Ins. Co. of the Southwest*, 623 F. Supp. 946, 948-49 (D. Utah 1985)). An ambiguous forum-selection clause must be construed strongly against the party who drafted it. *Keaty*, 503 F.2d at 957 (cited with approval in *Brock*, 113 F. Supp. 2d at 1089).

In *Psarros v. Avior Shipping, Inc.*, the forum-selection clause at issue stated that '[i]t is mandatory that any disagreement arising from the enforcement of this contract will be resolved in the Greek Courts, explicitly excluding the [plaintiffs] from seeking recourse in the Courts of the U.S.A. or in the Courts of any other country besides Greece.' 192 F. Supp. 2d 751, 752 (S.D. Tex. 2002). The court held that the clause was limited to matters of contract interpretation or enforcement alone and was inapplicable to litigation arising from torts committed in the course of the parties' contractual relationship. *Id.* at 753-54. According to the court, "notably, the clause does not refer to disagreements arising from torts committed by any of the contracting parties. Moreover, the clause lacks broad language purporting to make the clause applicable to tort claims (i.e. 'any and all claims arising out of Plaintiff's employment.')." *Id.* at 754.

Like the forum-selection clause at issue in *Psarros*, the SDMA's forum-selection clause does not apply to Sendo's tort claims against Defendants. The SDMA's forum-selection clause provides: "[t]his Agreement shall be construed and controlled by the laws of the State of Washington, and Sendo further consents to exclusive jurisdiction and venue in the federal courts sitting in King County, Washington, unless no federal subject matter jurisdiction exists, in which case Sendo consents to exclusive jurisdiction and venue in the Superior Court of King County, Washington." (Rommel Decl., *Exh.* 8, *c* at ¶ 14.1). This clause does not refer to disagreements arising from torts committed by Sendo or Microsoft, does not state that it applies to "any and all disputes" between the parties, and lacks any other broad language purporting to make the clause

applicable to Sendo's tort claims. Under *Psarros*, therefore, the SDMA's forum-selection clause does not apply to Sendo's tort claims and, as a result, this Court should afford it little weight.[5]

E. Private Convenience Factors

(1) Plaintiff's Choice Of Forum

Unless the balance is strongly in favor of defendant, plaintiff's choice of forum should '**rarely**' be disturbed. *Mohamed*, 90 F. Supp. 2d at 774 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *see also LeDoux*, 218 F. Supp. 2d at 837 ("plaintiff's choice of forum should not be disturbed, unless the balance of factors strongly favors the defendant."); *Schexnider v. McDermott Int'l, Inc.*, 817 F.2d 1159, 1163 (5th Cir.), *cert. denied*, 484 U.S. 977 (1987) ("plaintiff's choice of forum should rarely be disturbed"); *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966) (plaintiff's privilege of choosing forum is "highly esteemed"); *State Street Capital Corp. v. Dente*, 855 F. Supp. 192, 197 (S.D. Tex. 1994) (plaintiff's choice of forum entitled to "great deference").

In the case of *In re Triton*, Your Honor explained that the "the judicial system inherently provides a plaintiff with his choice of forum." 70 F. Supp. 2d at 688. In support of this proposition, Your Honor quoted the following Fifth Circuit passage:

> The existence of [forum choices] not only permits but indeed invites counsel in an adversary system, seeking to serve in his client's interests, to select the forum that he considers most receptive to his cause. The motive of the suitor in making this choice is ordinarily of no moment: a court may be selected because its docket moves rapidly, its discovery procedures are liberal, its jurors are generous, the rules of law applied are more

---

[5] *See also Hoffman v. Minuteman Press Int'l Inc.*, 747 F. Supp. 552, 553, 559 (W.D. Mo. 1990) (court denied defendant's motion to transfer, holding that plaintiffs' tort claim for fraudulent inducement was an attack on the agreement itself, did not arise under the agreement, and was not covered by a forum selection clause that stated "in the event of any litigation commenced by either party hereunder, such action shall be commenced and tried in a court of competent jurisdiction in the State of New York, or in the United States District Court for the Eastern District of New York"). Like the plaintiff in *Hoffman*, Sendo claims that Defendants fraudulently induced Sendo to enter into the NDA, SDMA, the Shareholders' Agreement, the OEM Embedded Operating Systems Licensing Agreement for Reference Platform Devices, and the Credit Agreement. (Complaint ¶¶ 88-90).

> favorable, or the judge who presides in that forum is thought more likely to rule in the litigant's favor.

Id. at 689 (quoting *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1261-62 (5th Cir. 1983)).

Defendants' contention that Sendo's choice of forum should be accorded little or no weight is misplaced for a number of reasons. First, as recently as 2000, the Eastern District of Texas held that "deference to the plaintiff's choice of forum never 'disappears' under any circumstances." *Mohamed*, 90 F. Supp. 2d at 774. At the very least, it "falls under this Court's analysis with the other ten or so private and public interest factors necessary for a proper Section 1404(a) analysis." *Id.* Second, as discussed *supra*, the only valid forum-selection clause at issue in this case is permissive, and thus, entitled to little if any weight in this Court's § 1404(a) analysis. Third, Plaintiff Sendo America, Inc. is headquartered in the State of Texas and at least three Sendo America, Inc. employees, including its President, performed work in the State of Texas in connection with the Z100. (Christian Decl. at ¶¶ 3, 5, 8-9; Hirsch Decl. at ¶¶ 5-7; and Valenzuela Decl. at ¶¶ 6-8). Finally, as discussed at length in the eleven (11) declarations attached to this response, a substantial number of operative facts occurred in the State of Texas. (*Id.*; *see also* Adjamah Decl. at ¶¶ 3-9; Baverstock Decl. at ¶ 4; Boireau Decl. at ¶¶ 3-7, 9-12; Brogan Decl. at ¶¶ 3-4, 6-10, 12-14, 16-17, 19-22; Declaration of Paul Hoffman ("Hoffman Decl.") at ¶¶ 3-8; Lewis Decl. at ¶ 3; Declaration of Terry Mullins ("Mullins Decl.") at ¶¶ 3-4; and Declaration of John Peasegood ("Peasegood Decl.") at ¶¶ 3-5). For the foregoing reasons, this Court should accord substantial deference to Sendo's choice of forum, a factor which weighs heavily against transfer to the Western District of Washington.[6]

---

[6] Defendants rely on *In re Horseshoe Entertainment*, 305 F.3d 354 (5th Cir. 2002) for the proposition that Sendo's choice of forum deserves little or no weight. (Defendants' Motion pp. 12-13). *Horseshoe*, which was decided 2-1 and contains a dissenting opinion by Judge Benavides, is distinguishable for a number of reasons. First,

(2) Convenience Of The Parties And Material Witnesses

The party seeking transfer must clearly specify the key witnesses expected to be called and make a general statement of what their testimony will cover. *Brock*, 113 F. Supp. 2d at 1088 (citing *In re Triton*, 70 F. Supp. 2d at 689-90). Defendants fail utterly in this regard. In fact, Defendants devote only one sentence of their Motion to the convenience of the witnesses, stating merely that "virtually all of the witnesses and most of the documents" are located in the Western District of Washington. (Defendants' Motion p. 13). Defendants neglect to identify any witnesses expected to give testimony in this case, let alone make a general statement of what their testimony will cover.[7] Moreover, Defendants fail to provide any information showing that its representatives, or more importantly, non-party witnesses, will be inconvenienced or burdened by having to testify in the Eastern District of Texas. Under *Brock* and *In re Triton*, Defendants' bald, generalized statement falls woefully short of meeting Defendants' burden, a fact which strongly militates against transfer to the Western District of Washington. *See Brock*, 113 F. Supp. 2d at 1088 (where defendant failed to specifically identify key witnesses and outline the substance of their testimony, defendant fell "far short" of supporting transfer); *In re Triton*, 70 F. Supp. 2d at 689-90 (same); *Thurmond*, 2000 WL 33795090, at *9 (same).

---

unlike this case, where Defendants concede that venue is proper, there was no indication that plaintiff's choice of venue was proper in *Horseshoe*. 305 F.3d at 359 ("we have serious doubts that the plaintiff's selection of the Middle District of Louisiana was a proper venue choice in this case.") Second, the Fifth Circuit relied heavily on a special venue provision applicable to plaintiff's Title VII and ADA claims which specifically limited venue to the 'judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice . . . .' *Id.* at 357 (citing 42 U.S.C. § 2000e-5(f)(3)). Needless to say, this special venue provision does not apply to Sendo's claims against Defendants. Finally, unlike here, where all of the convenience factors weigh against transfer to the Western District of Washington, in *Horseshoe*, all of the convenience factors, save location of counsel, weighed in favor of transfer to the Western District of Louisiana. *Id.* at 355-58.

[7] Even had Defendants identified witnesses, which they did not, the Eastern District of Texas has stated that it will not transfer cases "for the mere convenience of a few witnesses." *Mohamed*, 90 F. Supp. 2d at 775.

The fact that Defendants fail to identify any witnesses in their Motion is especially egregious given that the most important factor in the 1404(a) analysis is the relative convenience of the witnesses. *Gundle*, 844 F. Supp. at 1165. Unlike Defendants, Sendo has identified 3 Sendo representatives and 34 non-party witnesses from the State of Texas who performed work in connection with Microsoft's Stinger software and/or the Z100. (Rommel Decl., *Exh. 2*) (list of Texas witnesses and a statement of their expected testimony). These Texas witnesses would be significantly more inconvenienced if this case were transferred to the Western District of Washington than if it were to remain in the Eastern District of Texas.[8]

Finally, in weighing the convenience of the parties, a court may take into account "the relative financial strength of the litigants." *Gardipee v. Petroleum Helicopters, Inc.*, 49 F. Supp. 2d 925, 931 (E.D. Tex. 1999) (Court denied defendant's motion to transfer even though plaintiff was not a resident of the Eastern District of Texas because, on balance, the action would not proceed more conveniently and the interests of justice would not be better served by a transfer to the Western District of Louisiana). Microsoft is number seventeen on Forbes' 34th annual 500's directory. (Rommel Decl., *Exh. 3*). For the third quarter in 2002 alone, Microsoft had net income of $2.726 billion, total revenue of $7.746 billion, and net tangible assets of $50.661 billion. (*Id.* at *Exh. 4*). Suffice it to say, Microsoft can afford to try this case in the Eastern District of Texas. Sendo, on the other hand, was on the brink of financial ruin less than six months ago as a result of Microsoft's efforts to bankrupt Sendo and obtain an irrevocable royalty free license to use Sendo's Z100 intellectual property. (Complaint ¶¶ 41-42). In sum, the

---

[8] The convenience of non-party witnesses, not party employees, is the more important factor in the transfer analysis, a fact evidently lost on Defendants, who identify zero non-party witnesses whose convenience would be better served if this case were transferred to the Western District of Washington. *See Brock*, 113 F. Supp. 2d at 1088 (emphasis added); *State Street Capital Corp.*, 855 F. Supp. at 198 ("it is the convenience of non-party witnesses, rather than that of party witnesses, that is the more important factor and is accorded greater weight in a transfer of venue analysis"). This Court should accord little weight, therefore, to the fact that Microsoft Corporation's employees are located in the State of Washington.

convenience of the parties and witnesses, the latter being the most important factor in the Court's § 1404(a) analysis, unequivocally weighs against transfer to the Western District of Washington.

(3) The Place Of The Alleged Wrong

Defendants disingenuously conclude, with absolutely no analysis or support, that "[t]he only American venue that could be deemed the 'place of the alleged wrong' is the Western District of Washington." (Defendants' Motion p. 14). Of the seven parties to this lawsuit, only one, Defendant Microsoft Corporation, is located in the State of Washington. Plaintiff Sendo America, Inc., on the other hand, is headquartered in the State of Texas and suffered injury in Texas as a result of Microsoft's improper and tortious course of conduct. (Christian Decl. ¶ 3; Hirsch Decl. ¶ 3; and Valenzuela Decl. ¶ 3). Additionally, as discussed above, much of Sendo's relationship with Defendants centered around TI, who worked with both Sendo and Microsoft in the State of Texas on Sendo's Z100. (Adjamah Decl. at ¶¶ 3-9; Baverstock Decl. at ¶ 4; Boireau Decl. at ¶¶ 3-7, 9-12; Brogan Decl. at ¶¶ 3-4, 6-10, 12-14, 16-17, 19-22; Christian Decl. ¶ 8; Lewis Decl. at ¶ 3; Mullins Decl. at ¶¶ 3-4; and Peasegood Decl. at ¶¶ 3-5; *see also* Defendants' Motion, Ferrell Decl. at ¶ 9). In light of the foregoing, Sendo was most definitely harmed by Defendants' tortious course of conduct in the State of Texas, yet another factor weighing against transfer to the Western District of Washington.

(4) The Location Of Counsel

Defendants are represented by two law firms, neither of which are located or have offices in the Western District of Washington: Young, Pickett & Lee in Texarkana, Texas, and Winston & Strawn in Chicago, Illinois. Sendo also is represented by two law firms, both of which are located in the State of Texas: Patton, Haltom, Roberts, McWilliams & Greer, L.L.P. in Texarkana, Texas, and Jackson Walker L.L.P., in Dallas, Texas. Because Defendants' primary

counsel is not located (and does not have offices) in the Western District of Washington, this factor does not support transfer to the Western District of Washington.

(5) The Cost of Obtaining The Attendance Of Witnesses And The Availability Of Compulsory Process

As with so many of the convenience factors, Defendants' Motion neglects to address the cost of obtaining the attendance of witnesses and the availability of compulsory process. While Defendants have failed to identify any witnesses in this case whom will be less inconvenienced if the Court transfers this case to the Western District of Washington, Sendo has identified 3 party witnesses and 34 non-party witnesses who performed work on Microsoft's Stinger software and/or Sendo's Z100 in the State of Texas. These Texas witnesses would be less inconvenienced if this case proceeds in Texas, their home state, rather than Washington, a state half-way across the country. For example, most or all of these witnesses could drive, rather than fly, if trial proceeds in the Eastern District of Texas, and in many instances, these people would not need overnight lodging if this case remains in the Eastern District of Texas. Additionally, all 34 of the non-party witnesses identified by Sendo are outside the subpoena range of the Western District of Washington. They are not, however, outside the subpoena range of this Court. *See Mohamed*, 90 F. Supp. 2d at 778 (if witnesses reside in the State of Texas, they are within the subpoena range of the Eastern District of Texas); *Thurmond*, 2000 WL 33795090, at *11 (same). Given the foregoing, the reason Defendants neglect to address this 1404(a) factor is obvious--it unquestionably weighs against transfer to the Western District of Washington.

(6) The Accessibility And Location Of Sources Of Proof

While the accessibility and location of sources of proof factor only weighs slightly in the transfer analysis, particularly since these factors have been given decreasing emphasis due to advances in copying technology and information storage, this factor clearly weighs against transfer to the Western District of Washington. *See Mohamed*, 90 F. Supp. 2d at 778; *Brock*, 113 F. Supp. 2d at 1089 ("when documents can be easily copied and shipped to the Eastern District, the Court does not consider their present location 'an important factor in the transfer analysis.'") (citing *In re Triton*, 70 F. Supp. 2d at 690).

Defendants contend that "most of the documents" relevant to this lawsuit are located in Washington. (Defendants' Motion p. 13). Defendants exaggerate. Of the three Microsoft defendants, Microsoft Licensing, Incorporated and MCC are headquartered in Nevada. (Complaint ¶¶ 5-7). Of the four Sendo plaintiffs, one is headquartered in Dallas County, Texas and three are headquartered in the United Kingdom. (Complaint ¶¶ 1-4). In sum, six of the seven parties to this lawsuit are not located in the Western District of Washington. Moreover, just as many parties are located in Texas as Washington. Finally, because Defendants have retained counsel in Chicago, Illinois, any documents produced by Microsoft in this litigation will need to be shipped to Chicago regardless of whether the case proceeds in Texas or Washington.

The foregoing facts favor neither the Western District of Washington nor the Eastern District of Texas; however, given that a number of non-parties located in the State of Texas possess documents relevant to this lawsuit, this factor positively weighs against transfer to the Western District of Washington. TI, a critical non-party to this suit, has relevant documents located in the State of Texas. TI is headquartered in Dallas County, Texas, and has at least one facility located in the Eastern District of Texas. (Baverstock Decl. ¶5). Moreover, at least 17 TI

employees corresponded and/or met with Defendants and Sendo in Texas over the course of two years while working on Microsoft's Smartphone software and Sendo's Z100. (Adjamah Decl. at ¶¶ 3-9; Baverstock Decl. at ¶ 4; Boireau Decl. at ¶¶ 3-7, 9-12; Brogan Decl. at ¶¶ 3-7, 9-10, 12-14, 16-17, 19-22; Christian Decl. ¶ 8; Lewis Decl. at ¶ 3; Mullins Decl. at ¶¶ 3-4; and Peasegood Decl. at ¶¶ 3-5). Finally, there are four other non-parties located in Texas who presumably have documents relevant to this lawsuit, including Cingular, SBC Resources Technology, Inc., Dell, and Handango. (Christian Decl. at ¶ 6-7, Hirsch Decl. at ¶ 5-7; Hoffman Decl. at ¶ 3-4, 7-8; and Valenzuela Decl. at ¶ 5). In sum, the accessibility of sources of proof factor clearly weighs against transfer to the Western District of Washington.

(7) The Possibility Of Delay And Prejudice If Transfer Is Granted

On January 28, 2003, this Court issued an order setting a management conference in this case for April 7, 2003, less than two months away. (Rommel Decl., *Exh. 5*). The Court also proposed a trial setting for November 4, 2003, less than nine months away. (*Id.*) If this case were transferred to the Western District of Washington, the November 4, 2003, trial setting almost certainly would be delayed.[9] Sendo would be prejudiced severely by this delay because time is a critical element in Sendo's suit against Defendants. Because Sendo's intellectual property and technology is being used by others, including HTC and Compal, these third parties will achieve a competitive benefit in an industry where the typical life cycle of a wireless telephone model is a matter of months. Put another way, the delay associated with transferring this case to the Western District of Washington (potentially five months or more) is a significant percentage of the life cycle of the current Microsoft/HTC phones which are either on the market or close to market through network operators such as Orange in the United Kingdom and France

[9] According to the 2001 judicial caseload profile for the Western District of Washington, the median time from filing to trial for civil cases is fifteen (15) months). (*Id.* at *Exh. 6*).

and T-Mobile in the United States and Germany. Accordingly, the possibility of delay and prejudice weighs strongly against transfer to the Western District of Washington.

F. Public Interest Factors

(1) The Administrative Difficulties Caused By Court Congestion

As discussed above, this Court has set a management conference for April 7, 2003, and proposed a trial setting for November 4, 2003. Surely, Defendants cannot claim that the Western District of Washington will set this case for trial any earlier than this Court, which already has made time on its calendar for the resolution of this matter before Thanksgiving. Thus, there are no administrative difficulties in the Eastern District of Texas which justify transfer of this case to the Western District of Washington.

(2)-(3) The Local Interest In Adjudicating Local Disputes And The Unfairness Of Burdening Citizens In An Unrelated Forum With Jury Duty

Microsoft is a multi-billion dollar technology company with 47,600 employees. (Rommel Decl., *Exh. 3*). Microsoft trades stocks on a national basis, advertises in the Eastern District of Texas, sells its products in the Eastern District of Texas,[10] and is a defendant in at least one other case pending in the Eastern District of Texas, Texarkana Division.[11] In short, Microsoft is ubiquitous, and as such, the people of the Eastern District of Texas have an interest in adjudicating this dispute. *See LeDoux*, 218 F. Supp. 2d at 838 (people of the Eastern District of Texas had an interest in adjudicating dispute where defendant advertised in the Eastern District); *In re Triton*, 70 F. Supp. 2d at 691 (citizens of the Eastern District of Texas 'have a

---

[10] *See* Declaration of Charles Wade (Wade Decl.) (list of products sold in Texarkana, Texas, incorporating Microsoft software).

[11] *See The Massachusetts Inst. of Tech. et al. v. Abacus Software, Inc. et al.*, No. 501-CV-344-DF, United States District Court, Eastern District of Texas, Texarkana Division. In *M.I.T.*, Microsoft not only did not challenge venue pursuant to 28 U.S.C. § 1404(a), it admitted that venue was proper in the Eastern District of Texas in its Answer to Plaintiffs' First Amended Complaint. Nevertheless, Microsoft now argues that venue in Texarkana is somehow inconvenient, an argument Microsoft is hard-pressed to make with a straight face when it has been in litigation in Texarkana since May of 2002.

substantial interest in correcting any wrongdoing on the part of companies who trade stocks on a national basis.') (cited with approval in *Brock*, 113 F. Supp. 2d at 1090). Additionally, Microsoft Smartphones manufactured by HTC and Compal, phones that Sendo believes incorporate Sendo's intellectual property and technology, likely will be sold in the Eastern District of Texas and used by the citizens of this district as early as the first half of this year. (Rommel Decl., *Exh. 7*). The citizens of the Eastern District of Texas, therefore, have a substantial interest in adjudicating Sendo's claims against Microsoft, yet another factor militating against transfer of this case to the Western District of Washington.

(4) The Avoidance Of Unnecessary Problems In Conflict Of Laws

Denying Defendants' Motion will avoid conflict of laws problems because Texas law applies to Sendo's claims. Defendants contend that Washington law governs this dispute due to the SDMA's choice of law provision, but they have failed to demonstrate that Washington law differs in any material respects from Texas law. As the Eastern District of Texas has held, "[w]hen there is no evidence or discussion of another state's law, that law is presumed to be the same as Texas law." *Burleson v. Liggett Group, Inc.*, 111 F. Supp. 2d 825, 828 (E.D. Tex. 2000). Accordingly, the Court should presume that there are no conflict of laws in this case. Moreover, because Texas has the "most significant relationship" to the facts underlying Sendo's various tort claims, Texas law should apply to those claims irrespective of any choice of law provisions contained in the parties' contracts.[12] This factor, therefore, like all the previous convenience factors, weighs against transfer to the Western District of Washington.

---

[12] Texas has adopted the 'most significant relationship' test for the resolution of choice of law questions. *See Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 205 (Tex. 2000). With respect to tort claims, the factors for determining which law applies are: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered. *Burleson*, 111 F. Supp. 2d at 827 n.2. For the reasons set forth in the previous sections of this Response and the declarations attached hereto, Texas has the most significant relationship to the facts underlying Sendo's various tort claims.

WHEREFORE, Plaintiffs Sendo Limited, Sendo International Limited, Sendo Holdings PLC and Sendo America, Inc. respectfully request that the Court deny Defendants' Motion to Transfer Venue Pursuant to Rule 28 U.S.C. §1404(a). Should the Court find that Plaintiffs' Response does not compel a denial of the Defendants' Motion to Transfer Venue, Plaintiffs seek leave of this Court to conduct limited discovery as to (1) any facts underlying Sendo's claims which took place in the State of Texas; and (2) any facts underlying Sendo's claim that the SDMA's forum-selection clause was obtained by fraud and overreaching.

Respectfully submitted,

PATTON, HALTOM, ROBERTS, McWILLIAMS & GREER, L.L.P.

By: _____

George L. McWilliams
State Bar No. 13877000
Sean F. Rommel
State Bar No. 24011612
2900 St. Michael Drive, 4th Floor
Texarkana, Texas 75503
(903) 334-7000
(903) 334-7007 – Fax

ATTORNEYS FOR PLAINTIFFS

JACKSON WALKER L.L.P.

By: _____

Charles L. Babcock
State Bar No. 01479500
Nancy W. Hamilton
State Bar No. 11587925
Robert J. Garrey
State Bar No. 07703420
Ryan C. Wirtz
State Bar No. 24008292
901 Main Street, Suite 6000
Dallas, TX 75202
(214) 953-6000
(214) 953-5822 – Fax

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that on this 18th day of February, 2003, a true and correct copy of the foregoing document was served via facsimile upon:

Mr. Dan K. Webb
Winston & Strawn
35 West Wacker Drive
Chicago, IL 60601-9703

Via Facsimile No. 312-558-5700
RRR Certified Mail

Mr. Damon Young
Mr. Lance Lee
Young, Pickett & Lee
P.O. Box 1897
4122 Texas Boulevard
Texarkana, Texas 75501-1897

Via Hand Delivery

Sean F. Rommel